Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Communications Assistance for Law Enforcement Act and Broadband Access and Services	)	ET Docket No. 04-295
	)	RM-10865

To: The Commission

COMMENTS OF CINGULAR WIRELESS LLC

CINGULAR WIRELESS LLC

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TABLE OF CONTENTS

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Cingular Wireless LLC ("Cingular") hereby comments on the Commission's *Notice of Proposed Rulemaking* in the captioned proceeding.[1] For the reasons discussed herein, the Commission's tentative conclusions would, if adopted, unduly restrict the scope of "information services" excluded from the capability requirements of the Communications Assistance for Law Enforcement Act ("CALEA"), contrary to Congress's intent. To the extent that services or facilities are subject to CALEA in the first instance, the Commission should avoid categorically classifying particular types of information as call-identifying information. Furthermore, the Commission has ample authority and flexibility under Section 107(b) to afford carriers additional time for compliance. Finally, there is no need to clarify CMRS providers' cost recovery mechanisms – either as to CALEA deployment costs or per-intercept provisioning costs.

[1] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 04-187 (rel. July 7, 2004) ("*NPRM*" or "*Declaratory Ruling*" as applicable).

INTRODUCTION AND SUMMARY

As a provider of Part 22 cellular and Part 24 broadband PCS services, Cingular is a telecommunications carrier subject to the capability requirements of Section 103 of CALEA.[2] Cingular has worked aggressively in cooperation with law enforcement agencies ("LEAs") to bring its networks into compliance with Commission-adopted technical requirements for "J-Standard" and "punch list" capabilities, and has assisted LEAs in their efforts to effect lawful intercept orders, regardless of the services or facilities involved.[3] With respect to packet-mode and IP-based services generally, Cingular has participated in ongoing industry standards development processes, including the T1.724 standard applicable to GPRS technology. Cingular is committed to implementing the capabilities set forth in the T1.724 standard as compliant products become available.[4]

At the present time, however, it is clear to all parties involved that IP-based networks present new technical and engineering challenges for LEAs, carriers and vendors alike with respect to lawful intercept capabilities. Not surprisingly, given the history of the Commission's CALEA implementation, disagreements have arisen between the parties as to carriers' obligations under CALEA with respect to new IP and broadband technologies. In the *NPRM*, the Commission tentatively concludes, in essence, that these disagreements can be resolved largely by adopting whole cloth most of DOJ's statutory interpretations as set forth in its Petition.[5] As

[2] *See* 47 U.S.C. § 1001(8)(B)(i).

[3] *See* 47 C.F.R. §§ 22.1103, 24.903.

[4] Like many other carriers, Cingular has pending before the Commission a Section 107(c) extension request for its packet-mode services.

[5] *See* U.S. Department of Justice, Joint Petition for Expedited Rulemaking Concerning the Communications Assistance for Law Enforcement Act, filed March 10, 2004 (the "Petition").

the Commission acknowledges in the *NPRM*, however, Congress intended that CALEA protect interests in addition to LEAs' intercept capabilities:

> [W]e recognize that LEAs' needs must be balanced with the competing policies of avoiding impeding the development of new communications services and technologies and protecting customer privacy. We are committed to finding solutions that will allow carriers and manufacturers to find innovative ways to meet the needs of the law enforcement community without adversely affecting the dynamic telecommunications industry.[6]

For the reasons discussed herein, the Commission's tentative conclusions, if adopted, do not balance these objectives in the manner Congress intended.

First, the Commission has misinterpreted CALEA's distinction between telecommunications and information services. The Commission's and DOJ's restrictive interpretation of the information services exclusion is unduly narrow and is contrary to CALEA's statutory language and legislative history. Congress intended that information services be interpreted broadly and that its definition not be static. The Commission also significantly overstates the distinctions between the language of the Communications Act and that of CALEA. CALEA's definitions of telecommunications and information services reflect the understanding of those terms at the Commission and under the Modified Final Judgment at the time of CALEA's enactment, and are not tied to the "dial up" nature of some information services as the Commission and DOJ suggest.

The Commission's interpretation of the "Substantial Replacement Provision" is overbroad and places an unduly low threshold for expanding the scope of entities covered under CALEA. The terms "switching" and "transmission" in CALEA's Substantial Replacement Provision simply reflect that communications-related services have long been understood to incorporate transmission and switching components. Under the Commission's proposed

[6] *NPRM* ¶ 31.

approach, virtually every information service is a potential candidate for reclassification as a telecommunications service, an outcome contrary to Congress's intent. Similarly, the Commission's functional approach to determining whether a service replaces a substantial portion of the local telephone exchange service also imposes a minimal threshold further undermining CALEA's information services exclusion, again contrary to Congress's intent. Under the Commission's proposed approach any platform or technology that fills some functionality previously undertaken by a LEC, regardless of its significance, would trigger the Substantial Replacement Provision. Rather, the Substantial Replacement Provision more accurately reflects traditional distinctions between private and common carriage services and between basic and adjunct-to-basic services – an outcome reflecting a far less tortured reading of CALEA and accurately reflecting the regulatory regime at the time of CALEA's enactment.

Regarding CALEA requirements for packet-mode services, the Commission at this stage must defer to industry standards bodies efforts. T1.724 is not a deficient standard. In this regard, the Commission's list of information potentially qualifying as call-identifying information ("CII") is overinclusive, specifically as to "new or changed logins and passwords." Such changes in most cases take place outside a carrier's network and are not necessarily related to the intercept at issue; rather, such information is more akin to information in storage. Cingular agrees that CII not available at an intercept access point is not "reasonably available," and in this regard changed login and password information may not be reasonably available even if it is deemed CII. The Commission should also facilitate carriers' use of a third party/service bureau approach for compliance, as contractual arrangements and nondisclosure agreements are adequate to ensure that such a compliance approach is consistent with CALEA's requirements. Finally, T1.724 is a valid safe harbor standard which Cingular intends to deploy once available

from vendors. CALEA does not require, however, that carriers convert packet messages into the J-STD-025 format.

The Commission has ample authority under Section 107(b) of CALEA to adopt a reasonable compliance schedule for packet mode services and for entities newly-classified as telecommunications carriers. The Commission's and DOJ's assertion that Section 107(c) is not available for packet mode services is contrary to their own actions and, in any event, Section 107(b) provides the Commission with ample authority to afford carriers the opportunity to seek alternative relief and to request additional time for compliance, as proposed in the *NPRM*. Section 109(b), in contrast, is not a meaningful alternative.

Finally, the Commission's suggestion that states may preclude CMRS providers from recovering CALEA-related costs is flatly inconsistent with Section 332(c)(3)(A) of the Act. For this reason as well, a Commission-mandated "surcharge" is irrelevant to CMRS providers. Such a surcharge could unnecessarily and anticompetitively decrease demand for wireless services, and in any event the Commission has consistently held that CMRS providers may recover the costs of regulatory compliance through underlying rates or via line-item charges. With respect to intercept provisioning costs, the Commission's previous determination in the *Order on Remand* that carriers may recover a portion of their costs through per-intercept charges is consistent with CALEA and intercept statutes. In any event, the reasonableness of such charges is a matter for a court, not the Commission, to decide.

DISCUSSION

I. THE COMMISSION HAS MISINTERPRETED CALEA'S DISTINCTION BETWEEN TELECOMMUNICATIONS AND INFORMATION SERVICES

The Commission seeks comment on its tentative conclusion "that the meaning of 'telecommunications carrier' in CALEA is broader than its meaning under the Communications

Act" such that "Congress intended the scope of CALEA's definition … to be more inclusive than that of the Communications Act."[7] The Commission acknowledges that it departs from its previous determination in the *Second Report and Order* that "in virtually all cases … the definitions of the two Acts will produce the same results,"[8] but tentatively concludes that application of the "substantial replacement" test could effectively trump a service provider's existing classification as an "information service" provider under CALEA.[9] Dovetailing with this unduly narrow interpretation of "information services" is an overbroad interpretation of the "switching" capability that renders a service provider a "telecommunications carrier."[10] These tentative conclusions would eviscerate CALEA's definition of excluded information services and should not be adopted.

A. CALEA and Its Legislative History Do Not Support the Commission's Restrictive Interpretation of Information Services Excluded from Section 103's Requirements

Conspicuously absent from the *NPRM* is any thorough discussion of the scope of "information services" not subject to CALEA's requirements. As almost an afterthought, the Commission in the *NPRM* "note[s] that section 103(b)(2)(A) of CALEA provides that the CALEA capability requirements do not apply to information services."[11] In order "to give full effect to CALEA's broader definition of 'telecommunications carrier' and to the Substantial

[7] *Id.* ¶¶ 38, 41.

[8] *Id.* ¶ 41 (citing *Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 F.C.C.R. 7105, 7112 ¶ 13 (1999)).

[9] *Id.* ¶ 50 ("where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for purposes of CALEA").

[10] *Id.* ¶ 43.

[11] *Id.* ¶ 50.

Replacement provision" of Section 102(8) of CALEA, however, the Commission finds, in effect, that CALEA's definition of information services is not only *less* expansive than that of the Communications Act, but that CALEA even permits reclassification of an information service as a telecommunications service.[12] In doing so, the Commission largely accedes to the interpretation advocated by DOJ.[13]

CALEA's statutory language and legislative history do not warrant such a restrictive interpretation of CALEA's "information service." Congress intended "to preserve a *narrowly focused capability* for LEAs to carry out properly authorized intercepts."[14] A "telecommunications carrier" subject to CALEA "does not include … persons or entities insofar as they are engaged in providing information services."[15] CALEA defines "information services," in relevant part, as

> [T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [] includes -- (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities; (ii) electronic publishing; and (iii) electronic messaging services.

The Communications Act's definition is virtually identical – CALEA merely enumerates more examples than does the Communications Act of information services that fall within the broad definition that is common to both statutes.[16]

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[12] *Id.*

[13] *See* Petition at 11-14, 26-27.

[14] H.R. Rep. No. 103-827, at 13 (1994), *reprinted at* 1994 USCCAN at 3493 ("House Report").

[15] 47 U.S.C. § 1001(8)(C)(1).

[16] The Communications Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not
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CALEA's legislative history clarifies further that information services include but are not limited to "electronic mail providers, on-line services providers, such as Compuserve, Prodigy, [AOL] or Mead Data, or Internet service providers" while "[c]all forwarding, speed dialing, and the call redirection portion of a voice mail service are covered by the bill."[17] In addition:

> [T]he capability requirements only apply to those services or facilities that enable the subscriber to make, receive or direct calls. They do not apply to information services, such as electronic mail services, or on-line services, such as Compuserve, Prodigy, [AOL] or Mead Data, or Internet service providers. (The storage of a message in a voice mail or Email "box" is not covered by the bill. The redirection of the voice mail message to the "box" and the transmission of an E-mail message to an enhanced service provider that maintains the E-mail service are covered.)[18]

The Commission in the *NPRM* – like DOJ in its Petition – seizes on the examples of non-excluded services, and the "dial-up" nature of certain information services at the time of CALEA's enactment.[19] Nowhere does CALEA or its legislative history mention "dial-up" access, however, and in any event the types of information services cited therein were not

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include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

[17] House Report at 20, 1994 USCCAN at 3500. As to these software-based services, the House Report clarifies further that "the term 'information services' includes messaging services offered through software such as groupware and enterprise or personal messaging software, that is, services based on products (including but not limited to multimedia software) of which Lotus Notes (and Lotus Network Notes), Microsoft Exchange Server, Novell Network, CC:Mail, MCI Mail, Microsoft mail, … and AT&T Easylink (and their associated services) are both examples *and precursors*. *It is the Committee's intention not to limit the definition of 'information services' to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services.'* By including such software-based electronic messaging services within the definition of information services, they are excluded from compliance with the requirements of the bill." *Id.* at 21, 1994 USCCAN at 3501 (emphasis added). Thus, the definition of "information services" is not static and Congress anticipated and expected expansion of the definition.

[18] *Id.* at 23, 1994 USCCAN at 3503.

[19] *NPRM* ¶ 51 (citing to House Report, 1994 USCCAN at 3503); Petition at 26-27.

provided solely via dial-up at the time of CALEA's enactment.[20] Rather, the legislative history simply explains that "a carrier providing a customer with a service or facility *that allows the customer to obtain access to a publicly switched network* is responsible for complying with the capability requirements."[21] Thus, it is whether a particular service provides access to the PSTN – not a distinction between dial-up and non-dial-up information services – that was significant to Congress. The various services cited in CALEA's legislative history are merely illustrative of the information services prevalent at the time and do not evidence any intent by Congress to restrict the scope of the definition.

Congress in 1994 did not simply pull its information services definition out of thin air, any more than it did in 1996 in codifying nearly the exact same language in the Communications Act. Rather, the term "information services" evolved from the Commission's *Computer Inquiry* proceedings and was incorporated into the Modification of Final Judgment (MFJ) and, ultimately, the Communications Act in 1996.[22] Given that Congress saw fit to include virtually identical language in both statutes, the Commission's divergent interpretations cannot be justified.

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[20] Business and other enterprise customers have had access to the types of services enumerated in the House Report by means other then dial-up, such as X.25 and frame relay services, since the 1980s.

[21] House Report at 23, 1994 USCCAN at 3503 (emphasis added).

[22] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, ¶ 34 n.139 (2002) (explaining history of regulation of enhanced or information services and citing to *United States v. Western Electric Co.*, 673 F. Supp. 525 (D.D.C. 1987), 714 F. Supp. 1 (D.D.C. 1988), *rev'd in part*, 900 F.2d 283 (D.C. Cir 1990), as well as *Computer Inquiry* proceedings).

B. The Commission's Interpretation of the Substantial Replacement Provision is Overbroad and Places an Unduly Low Threshold for Expanding the Scope of Entities Covered by CALEA

Section 108(8)(B)(ii) of CALEA provides that a "telecommunications carrier" subject to CALEA's requirements includes:

> [A] person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title.[23]

The Commission implies that in order to "give full effect" to this "Substantial Replacement Provision," a service once classified as an information service can be reclassified as a telecommunications service, contrary to its interpretation of the Communications Act.[24] As discussed below, however, the "irreconcilable tension" presented by an alternative interpretation is purely one of the Commission's and the DOJ's own creation.[25]

1. The Commission Has Interpreted Too Broadly and Placed Too Much Significance on the Terms "Switching" and "Transmission" in CALEA

The Commission tentatively concludes that the term "switching or transmission service" broadly includes "routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations."[26] These functions, the Commission reasons, "are similar to the switching functions in a circuit-switched network and thus …

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[23] 47 U.S.C. § 1001(8)(B)(ii) (emphasis added).

[24] *NPRM* ¶ 50.

[25] *See id.*

[26] *Id.* ¶ 43.

CALEA's explicit inclusion of the word 'switching' is meant to include these capabilities."[27] In support of this conclusion, the Commission contrasts CALEA with the Communications Act's definition of "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received,"[28] finding that "change in form or content is irrelevant for CALEA as long as a transmission or switching function exists."[29]

Interestingly, the Commission here appears willing to apply a broad interpretation of "switching or transmission service" that accounts for developments in technology, yet adopts a static interpretation of CALEA "information services" that reflects only a narrow 1994 snapshot of that same technology. A more consistent, dynamic understanding of the technologies involved, as applied to *all* of CALEA's statutory provisions, requires that the Commission reconcile the relevant statutory terms in largely the same manner it has under the Communications Act. Such an approach is more consistent with CALEA's statutory language.

Moreover, in distinguishing between "switching" and "transmission," and between "transmission" with or without change in form or content, the Commission is drawing distinctions without differences. Communications-related services have long been understood to incorporate transmission *and* switching components.[30] The inclusion of those terms in CALEA's

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[27] *Id.*

[28] *Id.* ¶ 43 (citing 47 U.S.C. § 153(43)).

[29] *Id.* ¶ 43 n.104.

[30] *See, e.g.*, 47 C.F.R. §§ 51.701(c) (defining transport as "the transmission and any necessary tandem *switching* of telecommunications traffic), 51.701(d) (defining termination as "the *switching* of telecommunications traffic at the terminating carrier's end office switch …"); Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, §706(a), 110 Stat. 56, 153 (1996) (defining "advanced telecommunications capability" in relevant part as "high speed, *switched*, broadband telecommunications capability …")(emphasis added). More likely than not, Congress made explicit the term "switching" in CALEA out of an understanding that most

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telecommunications carrier definition and Substantial Replacement Provision, in itself, does not support the Commission attributing such significance to that language. Virtually every information and other non-common carrier service entails switching and transmission components and thus, by the Commission's proposed standard, every such service is a potential candidate for reclassification. This interpretation would essentially require the unbundling of every service (broadband or narrowband) such that the transmission and other facilities components are subject to CALEA.[31] If Congress had intended this result, it could simply have taken the same approach used in Title III of the Omnibus Crime and Safe Streets Act of 1968 ("Title III") and applied CALEA broadly to all facilities associated with "wire communication" and "electronic communication," terms that do not distinguish between telecommunications and information services, or between common and non-common carriage.[32]

In addition, the Commission has substantially overstated the differences between CALEA's and the Communications Act's use of the term "telecommunications carrier."[33] While the Commission seeks to distinguish the definition from that in the Communications Act, CALEA expressly cross-references the relevant Title III definitions which, in turn, defines

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intercepts are implemented at a carrier's switching facility. *See* House Report at 25, 1994 USCCAN at 3505 (discussing maximum capacity requirements in terms of intercepts at "a particular switch or system"); *id.* at 26, 1994 USCCAN at 3506 (discussing "switching premises" at which surveillance is effected).

[31] Further, subjecting transmission and other facilities to CALEA will not necessarily provide LEAs with the information they seek – only full packets are available from transport providers.

[32] *See* 18 U.S.C. §§ 2510(1), (12); House Report at 18 (earlier proposals "covered all providers of electronic communications services").

[33] A "telecommunications carrier" subject to CALEA is an "entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." 47 U.S.C. § 1001(8)(A).

"communication common carrier" in reference to the Communications Act.[34] Thus, the statutes themselves do not support the Commission's interpretation. Also, the Commission's determination that "change in form and content is irrelevant for CALEA" is dubious at best. That the term "telecommunications" is not defined in CALEA does not render it insignificant. In particular, the term "via telecommunications" and its statutory definition are critical to the Commission's interpretation of "information services" under the Communications Act,[35] yet the Commission ignores entirely the same language when discussing CALEA.

The Commission's tentative conclusions and DOJ's Petition in this regard reflect an outcome-oriented approach necessitating a strained interpretation of the relevant statutory terms. A straightforward interpretation of CALEA reflects that Congress simply adopted the terminology of Commission regulation and the MFJ that does not support an open-ended definition of "telecommunications carrier" trumping the statutory carve-out Congress established for information services.

2. The Commission's Functional Approach to Determining Whether a Service Replaces a Substantial Portion of the Local Telephone Exchange Service Reflects Its Unduly Restrictive View of CALEA's "Information Services"

The Commission tentatively concludes that the language "replacement for a substantial portion of the local telephone exchange service" in Section 101(8)(B)(ii) "reaches the replacement of any portion of an individual subscriber's functionality previously provided via POTS, *e.g.*, the telephony portion of dial-up Internet access functionality when replaced by broadband Internet access services."[36] Citing the purpose of the local exchange telephone

[34] *See* 47 U.S.C. § 1001(1) and 18 U.S.C. § 2510(10) (citing 47 U.S.C. § 153(h), since recodified at § 153(10)).

[35] *See* 47 U.S.C. §§ 153(20), (43).

[36] *NPRM* ¶ 44.

network "at the time CALEA was enacted," the Commission reasons that "[t]o the extent that individual subscribers use other platforms or technologies to replace particular functionalities of local exchange service, we believe that these other platforms and technologies constitute a local exchange service replacement for purposes of this prong of CALEA."[37]

Again, the Commission's tentative conclusion reflects its unduly restrictive view of the types of information services available at the time of CALEA's enactment.[38] Moreover, while the Commission appropriately notes that "replacement" under Section 332(d)(1) of the Communications Act entails an analysis of economic substitutability (as does Section 332(c)(3) for that matter),[39] the "functional" approach proposed for CALEA purposes imposes a minimal threshold that further undermines Congress's exclusion for information services. In short, any platform or technology that fills some functionality previously undertaken by a LEC, regardless

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[37] *Id.* The Commission stated that "the local exchange telephone network served two distinct purposes. First, it was a means to obtain POTS that enabled customers to make voice-grade telephone calls to other customers within a defined service area …. Second, it was (and still is to a large extent) the access conduit to many other services such as long distance services, enhanced services, and the Internet." *Id.*

[38] *See supra* Section I.A.

[39] *See NPRM* ¶ 44 n.113. Section 332(c)(3) in relevant part provides that "a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that -- (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a *replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service* within such State." 47 U.S.C. § 332(c)(3) (emphasis added). The Commission has previously noted that Congress placed a high hurdle for states to meet this threshold. *See* H.R. CONF. REP. No. 103-213, at 493 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1182; *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, ¶¶ 252-253 (1994) (states could not obtain such authority "[i]f . . . several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service" and "a substantial portion of the CMRS subscribers in the state or a specified geographic area [must] have no alternative means of obtaining basic telephone service").

of the particular functionality involved and no matter how infinitesimally small, would trigger the "replacement for a substantial portion" language of Section 102(8)(B)(ii). For the reasons discussed in the previous subsection, such an interpretation is inconsistent with Congress's exclusion for information services.

3. The Substantial Replacement Provision Parallels the Communications Act's and Commission's Distinctions Between Private and Common Carriage and Between Basic and Adjunct-to-Basic Services

The broad, virtually boundless scope of services the Commission's proposed approach would potentially reclassify as telecommunications carrier services subject to CALEA reflects a tortured reading of CALEA's terms. A much less strained, more plausible – and appropriate – interpretation would reflect the distinctions between common and private carriage, and between basic and enhanced service that the Commission had established at the time of CALEA's enactment.

For example, it was well established that communications services could be offered on both a common carrier and non-common carrier basis.[40] In this sense, the Substantial Replacement Provision is more akin to Section 254(d) of the Communications Act, which expands the scope of entities subject to universal service contributions to non-common carriers, providing that "[a]ny other *provider of interstate telecommunications* may be required to contribute to the preservation and advancement of universal service if the public interest so requires."[41] A far less tortured reading of the Substantial Replacement Provision would result in a similar result under CALEA.

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[40] *See, e.g., NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied* 425 U.S. 991 (1977).

[41] 47 U.S.C. § 254(d) (emphasis added). The Commission has applied Section 254(d) to require non-common carrier providers of telecommunications to end users to contribute to federal universal service programs. *See* 47 C.F.R. § 54.706(a).

In addition, the Commission had long established a dichotomy between "basic" and "adjunct-to-basic" services. The latter category includes services that, strictly speaking, are "enhanced services" but because they are "used in conjunction with 'voice' service" and "help telephone companies provide or manage basic telephone services," the Commission treats them as basic telecommunications services.[42] The legislative history indicates that Congress intended these adjunct-to-basic services to be subject to CALEA.[43]

Cingular submits that it is these distinctions that Congress had in mind in enacting the Substantial Replacement Provision. Today, for example, it may very well be that non-interconnected VoIP-based push-to-talk services are an appropriate candidate for reclassification under the Substantial Replacement Provision.[44] References in CALEA's legislative history to "[t]he redirection of the voice mail message to the 'box' and the transmission of an E-mail

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[42] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 F.C.C.R. 8061, 8118 (citing *North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 FCC 2d 349, 358, ¶¶ 23-24 (1985), *recon*., 3 F.C.C.R. 4385 (1988)). Adjunct to basic services include speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing, call tracking, and certain centrex features.

[43] *See, e.g.*, House Report at 20, 1994 USCCAN at 3500 (indicating that functions such as speed-dialing and call-forwarding are subject to CALEA).

[44] *See NPRM* ¶ 44 (inquiring whether any "classes of wireless services that may not meet the definition of 'commercial mobile service … may nevertheless satisfy this prong of the Substantial Replacement Provision") and *Declaratory Ruling* ¶ 151. The Commission reaffirmed in its *Declaratory Ruling* that "commercial mobile services" subject to CALEA under Section 102(8)(B)(i) are those that are interconnected to the public switched network. *Declaratory Ruling* ¶¶ 146, 150 (affirming *Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 F.C.C.R. at 7116-7117 ¶¶ 20-22 (stating that "to the extent providers offer service that is not interconnected to the PSTN (*e.g.*, dispatch service), they are not subject to CALEA")).

message to an enhanced service provider" reflect the types of services discussed above that straddled the lines between private versus common carriage, and between telecommunications versus enhanced/information services, at the time of CALEA's enactment. This more limited interpretation avoids the *NPRM*'s strained interpretations of "transmission," "switching," "telecommunications," and other CALEA terms resulting in the Commission's evisceration of CALEA's information services exclusion, and it more effectively preserves the scope of the term "information services" in a manner consistent with the Communications Act and CALEA.

II. CALEA REQUIREMENTS FOR PACKET-MODE SERVICES

To the extent that a particular packet-mode or VoIP service is subject to CALEA in the first instance, the Commission at this stage must defer to the efforts of standards bodies such as T1.724, which has developed the industry standard for Cingular's GPRS technology.[45] As the D.C. Circuit stated:

> Rather than simply delegating power to implement the Act to the Commission, Congress gave the telecommunications industry the first crack at developing standards, authorizing the Commission to alter those standards only if it found them "deficient."[46]

DOJ has asserted only in conclusory fashion that existing industry standards are deficient, but to date no one has formally petitioned the Commission to deem T1.724 deficient. The court has confirmed, however, that the Commission may not blithely trump the results of standards bodies' efforts.[47] Any specific capability requirements imposed on carriers must reflect these limits on the Commission's authority.

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[45] T1.724-2004, *UMTS Handover Interface for Lawful Interception*, was approved in January 2004 and is publicly-available in pre-published form.

[46] *United States Telecommunications Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000).

[47] *Id.* at 460-61 (Commission may not modify standard "without first identifying its deficiencies").

A. The Commission's List of Information Potentially Qualifying as Call-Identifying Information is Overinclusive

The Commission seeks comment on whether to clarify the term "call identifying information" ("CII") under CALEA, and posits that the term incorporates a wide variety of communication-related data for packet networks.[48] While Cingular is heartened that the Commission has stated that "[t]hose who consider T1.724 deficient … should identify specific deficiencies,"[49] the Commission must be wary in making blanket statements concerning the scope of information that constitutes CII under CALEA. Information available at a particular point in one network might not be reasonably available in another, and the Commission must take care not "to require any specific design of equipment, facilities, services, features or system configurations" in violation of Section 103(b) of CALEA.[50]

This point is underscored by the Commission's list of data that it posits might constitute CII, which includes "new or changed logins and passwords."[51] T1.724 does not cover such information, nor should it, because in most cases such changes take place outside of a carrier's network, residing in multiple platforms. As a result, it would be extraordinarily difficult and costly to provide. Under T1.724, and consistent with intercept statutes and CALEA, the LEA is provided the data stream and CII relative to the communication or session subject to the lawful intercept request. An intercept target's changed login and password, however, may be totally unrelated to the intercept at issue. Like Title III, Section 103(a)'s capability requirements apply only to the "interception" of "communications," yet categorically declaring a new or changed

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[48] *NPRM* ¶¶ 66-68.

[49] *Id.* at App. D.

[50] *See* 47 U.S.C. § 1002(b)(1)(A).

[51] *See NPRM* ¶ 66.

login and password as CII would be akin to expanding CALEA to cover call-related information in storage.[52] In this regard also, it is not at all clear how this information necessarily constitutes "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier."[53] As the Commission determined in the *Third Report and Order*, the fact that information may prove useful to a LEA does not render it CII.[54]

B. CII Held by Another Carrier or Not Accessible at an Intercept Access Point Is Not "Reasonably Available."

The Commission seeks comment on "how the Commission should apply the term 'reasonably available'" to broadband Internet access and VoIP providers, and tentatively concludes that CII "may not be 'reasonably' available if the information is only accessible by significantly modifying a network."[55] Cingular generally supports the Commission's approach, which is consistent with the Section 103(b) prohibition on "requir[ing] any specific design of equipment, facilities, services, features, or system configurations."[56]

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[52] *See Communications Assistance for Law Enforcement Act*, Order on Remand, 17 F.C.C.R. 6896, ¶ 78 (2002) ("*Remand Order*") ("CALEA's focus" is "the interception of particular communications" and CII "is defined in terms of 'communication generated or received by a subscriber'"); *see also Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457, 460-63 (5th Cir. 1994) (distinguishing between information in storage versus real-time acquisition of information at the time of the communication); *Wesley College v. Pitts*, 974 F.Supp. 375, 384-90 (D.Del. 1997) (same). LEAs' access to call-related information in storage is not governed by interception statutes, but by 18 U.S.C. § 2703 *et seq*.

[53] *See* 47 U.S.C. § 1001(2).

[54] *Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 F.C.C.R. 16794, ¶ 101 (1999).

[55] *NPRM* ¶¶ 67-68.

[56] 47 U.S.C. § 1002(b).

In this regard also, the Commission must pay particular heed to its recognition that "when looking at end-to-end service architectures, it is not always readily apparent where call-identifying information is available."[57] In some cases, CII may simply be unavailable on a carrier's network. Using the example of password and login changes discussed above, even if the Commission determines that such information constitutes CII, it is not necessarily the case that such information will be available to the carrier at an Intercept Access Point.[58]

C. The Commission Should Facilitate Carriers' Use of a Third Party or Service Bureau as an Option for CALEA Compliance.

The Commission seeks comment on the implications of a "trusted third party" or service bureau approach.[59] Cingular is generally supportive of the service bureau approach, as it provides carriers with competitive alternatives among different vendors and could help mitigate carriers' cost burdens. The Commission also seeks comment on how a carrier using a trusted third party "would meet its obligations … to protect the privacy and security of communications and [CII] not authorized to be intercepted, as well as to protect information regarding the government's interception of communications and access to [CII]."[60] Generally, contractual arrangements and nondisclosure agreements would be adequate to address these issues. Such arrangements, combined with the possibility of an enforcement action being brought by LEAs under 18 U.S.C. § 2522, would adequately ensure a carrier's compliance with its obligations.

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[57] *NPRM* ¶ 68.

[58] *See Third Report and Order*, ¶ 28 (rejecting interpretation of "reasonably available" that "would apply to call identifying information located anywhere within a carrier's network, rather than at the IAP location where the information is being captured for the LEA.").

[59] *NPRM* ¶¶ 69-76.

[60] *Id.* ¶ 76.

D. Safe Harbor Standards

A carrier is deemed compliant with Section 103 if it "is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization."[61] As noted above, standard-setting organizations TIA and ATIS have adopted CALEA standard T1.724 for GSM, EDGE and UMTS technologies, which is now publicly available in pre-published form. Compliance with T1.724 therefore constitutes Section 103 compliance as to the services covered by the standard. Cingular's vendors have supported the adoption of this standard through their affirmative vote and Cingular intends to deploy their solutions throughout its packet-mode networks once vendors make them available. Furthermore, Cingular participated in the development of T1.724, and believes that it meets the requirements of Section 103 and is not deficient.

The Commission notes that LEAs have raised the issue of "whether [packet] messages must be converted into a format and common language more consistent with the messages in" the core J-Standard.[62] Carriers should cooperate with LEAs on this matter to provide the information in a mutually agreeable format. There is no obligation under CALEA, however, that carriers convert all information into J-STD-025 format. Section 103(a)(3) requires that a carrier:

> deliver[] intercepted communications and [CII] to the government, pursuant to a court order or other lawful authorization, in a format such that they may be transmitted by means of equipment, facilities, or services procured by the government to a location other than the premises of the carrier.[63]

CALEA's legislative history clarifies further that "[i]f the communication at the point it is intercepted is digital, the carrier may provide the signal to law enforcement in digital form" but

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[61] 47 U.S.C. § 1006(a)(2).

[62] *NPRM* ¶ 84.

[63] 47 U.S.C. § 1002(a)(3).

"[l]aw enforcement is responsible for determining if a communication is voice, fax or data and for translating it into useable form."[64] Thus, Congress clearly intended that LEAs, not carriers, would have full responsibility for format interpretation, protocol conversion and similar translations.

The Commission already substantively addressed this matter in the *Third Report and Order* and found that CALEA does not require such a capability.[65] In any event, T1.724 data is easily transmitted to a LEA's premises by equipment and facilities procured by LEAs. Conversion of the data to J-STD-025 format could theoretically be accomplished at either the LEA's or the carrier's premises – but this capability cannot be mandated as it is not integral to a carrier's "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications" that are subject to Section 103(a)'s requirements. Thus, while some carriers may find it easy enough to provide the capability for LEAs, the Commission may not compel carriers to do so.

III. EXTENSION PETITIONS

The Commission seeks comment on whether "to restrict the availability of compliance extensions under section 107(c), particularly in connection with packet-mode requirements," but the agency also "intend[s] to afford all carriers a reasonable period of time in which to comply with, or seek relief from, any determinations that we eventually adopt."[66] Specifically, the Commission states its belief "that a section 107(c) extension is not available to cover equipment,

[64] House Report at 22, 1994 USCCAN at 3502.

[65] *Third Report and Order* ¶ 136 ("reject[ing] the DoJ/FBI proposal to include a standardized delivery interface capability").

[66] *NPRM* ¶¶ 87, 91.

facilities, or services installed or deployed after October 25, 1998."[67] As the Commission acknowledges, this interpretation "represent[s] a change from the manner in which the Commission has applied section 107(c) in the past."[68]

In reaching this tentative conclusion, the Commission has largely adopted DOJ's self-serving interpretation of Section 107(c).[69] This interpretation, however, is unduly narrow, as evident by LEAs' ongoing participation in the flexible deployment program (including for packet mode services through 2003). The codified deadlines for CMRS providers – June 30, 2000 for core J-Standard, September 30, 2001 for packet-mode, and June 30, 2002 for punch list – were adopted pursuant to *Section 107(b)* of CALEA in response to deficiency petitions**,** *not Section 107(c)*.[70] Section 107(b) expressly authorizes the Commission to "provide a *reasonable time and conditions for compliance with and the transition to any new standard*, including defining the obligations of telecommunications carriers under section 103 during any transition period."[71] Subsequent deadlines imposed for packet-mode services can thus be viewed, in effect, as a waiver of the Commission's codified rules and further Commission action under Section 107(b), rather than *ultra vires* Commission action, as DOJ and the Commission seem to imply.[72]

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[67] *Id.* ¶ 97.

[68] *Id.* ¶ 101.

[69] *See, e.g.*, U.S. Dept. of Justice, Statement of Non-Support Opposing Petition of AT&T Wireless, filed in CC Docket No. 97-213, at 3-5.

[70] *See Third Report and Order* ¶ 158.

[71] 47 U.S.C. § 1006(b)(5) (emphasis added).

[72] *See Communications Assistance for Law Enforcement Act*, Order, 16 F.C.C.R. 17397, ¶ 18 (2001) (extending date to November 19, 2001); *The Wireline Competition and Wireless Telecommunications Bureaus Announce a Revised Schedule for Consideration of Pending Packet Mode CALEA Section 107(c) Petitions and Related Issues*, Public Notice, CC Docket No. 97-213, 18 F.C.C.R. 24243 (2003) (extending date to January 30, 2004). In this light, the Commission's and carriers' use of (and LEAs' acquiescence in) the Section 107(c) procedures
(continued on next page)

This interpretation gives the Commission the flexibility required to comply with other provisions of CALEA, namely that CALEA not "prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service" and that the Commission's imposition of new technical standards by rule "serve the policy of the United States to encourage the provision of new technologies and services to the public."[73] Under the Commission's interpretation, most packet-mode services and facilities in existence today post-date the October 25, 1998 CALEA effective date and, thus, carriers initiating such services would not have any relief available to them under Section 107(c). As evident in the Commission's 97-213 docket and in the *NPRM*, however, uncertainties may arise as to the services, facilities, and call information subject to CALEA -- in which case CALEA provides for the Section 107(b) deficiency petition process or a separate determination under the Substantial Replacement Provision. In contrast, DOJ's and the Commission's rigid interpretation fails to "comport[] with the realities of packet-based technology development"[74] such that in the event the Commission determine that application of the Substantial Replacement Provision renders a particular service subject to Section 103, carriers could be subject to immediate enforcement action in court by LEAs.[75]

The Commission's proposal to afford carriers the opportunity to seek "alternative relief" and to request additional time of not more "than two years after the date of the petition" is clearly

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and standards can be viewed, in essence, as a means of compliance with the "reasonable time and conditions" language of Section 107(b)(5).

[73] *See* 47 U.S.C. §§ 1002(b)(1)(B), 1006(b)(4).

[74] *NPRM* ¶ 102.

[75] *See infra* note 78 (discussing Congress' intent that the *Commission* be principally charged with determining the legitimacy and reasonableness of standards).

authorized under Section 107(b).[76] The deficiencies of packet mode industry standards are at issue in the *NPRM*, and the Commission's authority under Section 107(b)(4) is thus clearly invoked. Moreover, Section 109(b), as the Commission notes, is intended for "extraordinary" circumstances, and is not a meaningful alternative.[77] For most carriers, Cingular expects compliance with packet-mode CALEA requirements will entail something of a "non-extraordinary" middle ground: on one hand, a carrier may need additional time to come into compliance as to a particular vendor's technology or particular markets, or a carrier may be able to provide most but not all of the required CALEA capabilities by a particular deadline; on the other hand, the same carrier does not need a perpetual waiver from or government compensation for its compliance. Section 109(b) is ill-equipped and not intended to address such circumstances, but Section 107(b) is, and the Commission should not cede the role in adjudicating the reasonableness and implementation of capability standards that Congress intended.[78] In all instances, existing carriers offering newly-reclassified services, as well as new "telecommunications carriers" deemed as such under the Substantial Replacement Provision, should be afforded the same period of time for compliance.

[76] *See NPRM* ¶¶ 101, 103.

[77] *See NPRM* ¶ 104.

[78] CALEA's legislative history notes that "[t]he FCC retains control over the standards" under Section 107, and the Commission, not law enforcement, was expressly designated as the forum for resolving disputes "over the technical requirements or standards." *See* House Report at 27, 1994 USCCAN at 3507. Congress clearly did not intend that deliberations concerning the government's imposition of appropriate standards for new technologies would be the subject of *ex parte* discussions between LEAs and carriers – as would likely be the case should the Commission decline to exercise authority under Section 107(b). *See id.* (Section 107 "intended to add openness and accountability to the process of finding solutions to intercept problems"). Congress viewed as problematic arrangements whereby carriers and LEAs address capability issues "on a case by case basis in negotiations." *Id.* at 14, 1994 USCCAN at 3494.

IV. COST RECOVERY

The Commission "tentatively conclude[s] that carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities" and seeks comment on whether carriers are able to recover costs "through their normal charges" and whether it should "adopt rules specifically allowing carriers to recover CALEA compliance costs from their customers."[79] The Commission asks whether guidance is required regarding "the recovery of CALEA costs from end-users" and the "competitive effect of such guidance." As to CMRS providers in particular, the Commission acknowledges that "Section 332(c)(3)(A) of the Communications Act precludes state regulation of the rates charged by any commercial mobile service" and that "CMRS carriers could collect directly from their customer base on a competitive market basis."[80]

Section 332(c)(3) and the Commission's implementation of it largely speak for itself. Section 332(c)(3) provides that "no State or local government shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[81] In the enhanced 911 context, the Commission has stated that "[i]f a State purported to prohibit carriers from recovering E911 costs in their rates, it could be engaging in rate regulation."[82] This same rationale applies to Section 332(c)(A) in the CALEA context. Thus, the Commission's suggestion that "states may

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[79] *NPRM* ¶ 125.

[80] *Id.* ¶¶ 118, 128-29.

[81] 47 U.S.C. § 332(c)(3) (emphasis added).

[82] *See Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, 14 F.C.C.R. 20850, ¶ 61 (1999), *aff'd sub nom. United States Cellular Corp. v. FCC*, 254 F.3d 78 (D.C. Cir. 2001).

expressly provide for or preclude the recovery of CALEA compliance costs" is flatly inconsistent with Section 332(c)(A).[83]

For this reason as well, the Commission's inquiry concerning a Commission-mandated "surcharge" is irrelevant to CMRS providers.[84] Such a mandated charge could unnecessarily and anticompetitively decrease demand for wireless services. Moreover, the Commission has determined that CMRS providers may recover the costs of regulatory compliance through their underlying rates for service or via line-item charges, subject to the Commission's Truth-In-Billing rules and Section 201(b),[85] and in any event issues concerning such line item charges have been raised in a pending proceeding.[86]

With respect to intercept provisioning costs, CALEA simply provides that the government itself will not reimburse carriers for post-1994 costs and in itself does not restrict carriers from recovering such costs through charges of any kind, such as on a per-order basis.[87] Title III, governing intercept orders, provides generally that:

> An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person

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[83] *See NPRM* ¶ 130. Such an expansive interpretation of states' "other terms and conditions" authority would effectively nullify Section 332(c)(A)'s preemptive scope.

[84] *See NPRM* ¶ 129. Given the public safety benefits of CALEA deployment that extend beyond a carrier's subscribers to the public generally, such costs are ideally funded through Congressional appropriations processes. As CALEA largely precludes such an approach for post-1994 equipment and facilities (except in cases of Section 109(b) requests), CMRS providers are able to recover such costs from across their customers broadly (as Section 332(c)(3) allows).

[85] *See Truth-In-Billing*, First Report and Order and Further Notice of Proposed Rulemaking, 14 F.C.C.R. 7492, 7526-27 (1999).

[86] *See National Ass'n of State Util. Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-In-Billing and Billing Format*, Public Notice, CG Docket No. 04-208, DA 04-1495 (rel. May 25, 2004).

[87] *See* 47 U.S.C. § 1008(b).

> shall furnish the applicant forthwith *all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference* with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance *shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance*.[88]

CALEA similarly provides that a carrier must ensure that its facilities and equipment are capable of "facilitating authorized communications interceptions and access to [CII] *unobtrusively* and with a *minimum of interference* with any subscriber's telecommunications service."[89]

Cingular submits that CALEA-related facilities upgrades are part and parcel to the "facilities and technical assistance" described in Title III. The only issue, then, is the extent to which a carrier's per-intercept billing of such costs to LEAs is "reasonable" under Title III – and this is an issue appropriately left for a court to decide on a case-by-case basis, *not* the Commission in the instant rulemaking proceeding.[90] The Commission's previous determination in the *Order on Remand* is thus consistent with both CALEA and Title III.[91]

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[88] 18 U.S.C. § 2518(4) (emphasis added).

[89] 47 U.S.C. § 1002(a)(4) (emphasis added).

[90] The Commission has deferred to the judiciary as to the appropriate interpretation of Title III's various requirements, and must do so again here. *See, e.g.*, *Order on Remand* ¶ 83 ("declin[ing] to decide whether a Title III warrant is an alternative to dialed digit extraction"); *see also USTA v. FCC*, 227 F.3d at 465 ("CALEA authorizes neither the Commission nor the telecommunications industry to modify either the evidentiary standards or procedural safeguards for securing legal authorization to obtain packets from which call content has not been stripped, nor may the Commission require carriers to provide the government with information that is 'not authorized to be intercepted.'").

[91] In the *Order on Remand*, the Commission stated that "carriers can recover at least a portion of their CALEA software and hardware costs by charging to LEAs, for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order." *Order on Remand*, 17 F.C.C.R. at 6917 ¶ 60. That "LEAs have expressed concern" for increases "in carriers' bills for intercept provisioning" may simply reflect that intercepts of communications over today's
(continued on next page)

CONCLUSION

To the extent described herein, the Commission should not adopt many of the tentative conclusions set forth in the *NPRM*.

Respectfully submitted,

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telecommunications and IP-based facilities are more complicated and, thus, more costly to implement. *See NPRM* ¶ 132 n.316 (citing DOJ Petition at 68).